No. 03-605

Supreme Court, U.S.
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In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

PAUL MANTOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that an arbitration agreement or employment contract is unconscionable when i) the employee could not negotiate any of the terms of the agreement and he was told his career with the company would be over if he did not accept it; and ii) the employer controlled the administration of the arbitration plan and made the decision unilaterally whether the employee's claim would be accepted?

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INTRODUCTION

Petitioner Circuit City Stores, Inc. ("Petitioner" or "Circuit City") brings this case, initiated by its manager Paul Mantor ("Respondent" or "Mr. Mantor") as a lawsuit in California Superior Court, as an adjunct to its petition to review *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165. (*See* Petition for Writ of Certiorari, *Circuit City Stores, Inc. v. Ingle*, No. 03-604.) Respondent's counsel agrees that most dispositive issues are addressed in his Brief in Opposition to that petition.

Petitioner asks this Court as it does in *Ingle* to carve out a special exemption from state contract law for employers who impose compulsory pre-dispute arbitration programs on its employees and applicants for employment. Petitioner finds authority for its proposition in the Federal Arbitration Act ("FAA") Section 2.

The appellate court reviewed the entire record and found that Circuit City had imposed its arbitration program on Mr. Mantor without giving him a meaningful opportunity to negotiate its terms or to reject it if he chose to do so. Circuit City's District Manager forthrightly told Mr. Mantor that if he didn't sign up for the arbitration program he would have "no future with Circuit City." The appellate court concluded that a choice considered under threat of termination was no meaningful choice at all.

There is no question presented in this petition other than the one presented in *Ingle*. The *Mantor* petition, standing alone, presents no serious reason to grant certiorari. Even if the *Ingle* petition were granted, nothing is gained by granting this petition or by holding the case pending a result in *Ingle*. For the reasons explained more

fully in the Brief in Opposition filed in *Ingle*, that petition should be denied as well.

California and the Ninth Circuit treat mandatory employment arbitration agreements the same as other contracts. This is what the FAA requires. Under generally-applicable contract law, the agreement Circuit City imposed on Mr. Mantor by threat of termination was unconscionable and thus it was unenforceable. The Ninth Circuit ruled correctly. This Court should deny the petition for writ of certiorari.

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. Section 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

California Civil Code ("CC") § 1670.5(a) reads:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it

may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

FACTS AND PROCEDURAL BACKGROUND

Mantor worked for Circuit City from August 1992 until October 2000, when Circuit City terminated his employment as a manager. Mantor alleges and the circumstances indicate that he was terminated in response for his truthful testimony in support of a lower-level employee in a sexual assault case brought against her Circuit City manager.

When Circuit City hired Mantor, it had no arbitration program. In 1995, Circuit City implemented an arbitration program called the "Associate Issue Resolution Program" (AIRP).[1] Circuit City emphasized to managers the importance of full participation in the AIRP, claiming that the company had been losing money because of lawsuits filed by employees. Circuit City management stressed that employees had little choice in this matter; it suggested that employees ought to sign the agreement or prepare to be terminated. Although Circuit City circulated the forms regarding the AIRP in 1995, Mantor was able to avoid

[1] Circuit City refers to all job applicants and to current and former employees as "Associates."

either signing up or openly refusing to participate[2] in the AIRP for three years.

In 1998, Circuit City District Manager Brad Weiland and Circuit City's Personnel Manager for Northern California Karen Craig arranged a meeting with Mantor to discuss Mantor's participation in the AIRP. During this meeting, Mantor asked Weiland and Craig what would happen should he decline to participate in the arbitration program. The Circuit City managers responded to the effect that he would have no future with Circuit City. On February 13, 1998, Mantor agreed to participate in the AIRP, acknowledging in writing his receipt of (1) an "Associate Issue Resolution Handbook," (2) the "Circuit City Dispute Resolution Rules and Procedures," and (3) a "Circuit City Arbitration Opt Out Form."[3]

On October 10, 2001, a year after Circuit City terminated his employment, Mantor brought a civil action in state court, alleging twelve causes of action. The causes of action included: (1) tortious termination in violation of public policy; (2) retaliation; (3) breach of contract; (4) breach of implied covenant of good faith and fair dealing; (5) violation of California Labor Code § 970; (6) fraud-intentional misrepresentation; (7) fraud-negligent misrepresentation; (8) intentional infliction of emotional distress;

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[2] Circuit City circulated an "opt-out" form by which its employees could ostensibly elect not to participate in the AIRP.

[3] The record is uncontroverted on this point. Petitioner had the opportunity to offer contrary evidence concerning the agreement to arbitrate at the hearing of the motion to compel arbitration if any such evidence existed. It did not do so.

(9) negligent infliction of emotional distress; (10) defamation; (11) failure to pay earned wages and reimburse expenses; and (12) age discrimination.

On October 17, 2001, to preserve his right to arbitrate his claims in the event that a court determined that his claims were subject to arbitration, Mantor submitted an Arbitration Request Form and a cashier's check in the amount of seventy-five dollars to Circuit City's Arbitration Coordinator.

On November 26, 2001, Circuit City petitioned the district court to compel arbitration under 9 U.S.C. §4. On December 27, 2001, following briefing and oral arguments, the district court granted Circuit City's motion to compel arbitration and stayed the state court action pending arbitration. On January 25, 2002, Mantor filed a timely notice of appeal with the Ninth Circuit Court of Appeals.[4]

REASONS THIS PETITION SHOULD NOT BE GRANTED

Petitioner misrepresents the Ninth Circuit's opinion as it respects substantive unconscionability. First, the statute of limitations provision was criticized (in *Ingle*, the opinion cited for this proposition) because the statute of limitations contained in the "rules" promulgated by Circuit City shortened the time for filing certain claims so that the time for filing a number of potential claims – including

[4] This statement of facts is taken directly from the appellate opinion, with one substantive addition and some editorial changes and deletions.

most of Mr. Mantor's claims – was truncated substantially. Moreover, the time limitation precluded operation of the "continuing violation" theory of employment discrimination that had recently been clarified by the State Supreme Court in *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 29 P.3d 175 (2001). (*See Ingle, supra*, 328 F.3d at 1175, citing *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894, *cert. den.*, 532 U.S. 938 (2002).)

Additionally, Petitioner derides the opinion insofar as it finds the $75.00 filing fee to be oppressive. However, as the opinion states expressly: "In *Ingle*, we criticized the filing fee rule in the 1998 version because 'the employee is required to pay Circuit City for the privilege of bringing the complaint. [*Ingle*, 328 F.3d at 1177]." (*Mantor*, Pet.App. 9a.)[5] This provision gave Circuit City the unfettered discretion to decide when and whether the fee would be waived or a cognizable claim had been filed against it that it would deem worthy to submit to the arbitrator. This is no idle or hypothetical power: Circuit City determined here that Mr. Mantor had not complied with the claim filing rule, and rejected it. (*Mantor,* Pet.App. 3a, n.6.)

Finally, Petitioner inaccurately criticizes the appellate panel for relying on the case refusing to enforce a provision precluding arbitration of class actions, *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal.Rptr. 862, *rehg. den., review den.* (2002). The California Supreme Court decided to review the case, hence it was governing

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[5] *Mantor* considered the 2001 version of Circuit City's DRA; *Ingle* examined the 1998 version. (*See Mantor*, Pet.App. 4a, n.8; also Pet.App. 8a.)

law on the issue. The Ninth Circuit was wholly justified in recognizing that this would remain the law, even as a contrary opinion had been granted review.

With respect to procedural unconscionability, Petitioner's rendition of the facts and its characterization of the court's holding omits key findings. The court found expressly: "The fact that Circuit City management pressured and even threatened Mantor into assenting to the agreement demonstrates that he had no *meaningful* opportunity to opt-out of the program." (*Mantor*, Pet.App. 8a, emphasis added.)

This aspect of the *Mantor* opinion spotlights Petitioner's error in both the *Ingle* and *Mantor* briefs. Employer/employee agreements are not "automatically" found to be procedurally unconscionable in the Ninth Circuit. Circuit City's AIRP was found procedurally unconscionable in *Ingle* and *Mantor*, but not in the cases cited in *Mantor*, Pet.App. 6a, *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002) and *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002). The differing results are not a product of failed intra-circuit communication or legal inconsistency. The results are different because Circuit City employees Najd and Ahmed had meaningful opportunities to negotiate – to accept the AIRP or opt-out of it. They each chose not to opt-out. The Ninth Circuit compelled each of them to arbitrate, even though the agreement and its rules were substantively unconscionable. Ms. Ingle and Mr. Mantor did not. These results comport fully with CC §1670.5 and California cases construing that statute.

CONCLUSION

For the foregoing reasons and for the reasons stated in the *Ingle* Brief in Opposition, Respondent respectfully requests that Circuit City's petition be denied.

Respectfully submitted,

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